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THROW THE BOOK AT THEM: WHY THE FTC NEEDS TO GET TOUGH WITH INFLUENCERS

Christopher Terry,* Eliezer Joseph Silberberg** & Stephen Schmitz***

The Federal Trade Commission is an administrative agency that has traditionally been aggressive when deploying its delegated authority. At the core of these actions is the FTC’s interpretive definition of deception as based upon a reasonable consumer standard. Specifically, the commission has regularly used Section 5(a) of the FTC Act, in tandem with its interpretive definition of deception, as a sword in a variety of contexts, including enforcement actions for deceptive advertising, endorsements, and claim substantiation against a range of industries. These include successfully brought actions or consent decrees obtained in

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enforcement proceedings against powerful economic entities, including Google and Facebook. Yet, in one area, the FTC has been reluctant to engage in the hard tactics it regularly deploys in other areas. The Commission has struggled to employ a coherent enforcement strategy for deceptive practices by Social Media Influencers. The Commission has taken significant steps towards deception and disclosure enforcement for influencers, including publication of a set of guidelines for disclosure. However, with the exception of a series of warning letters sent to high profile influencers in April of 2017, the Commission has not engaged in a significant enforcement action—choosing instead to launch an inquiry in February 2020 to review the disclosure guidelines. As empirical research demonstrates that consumers do not understand the nature of the influencer process, this Article argues that the FTC should employ a commitment to a robust enforcement stance. The FTC’s failure to “make an example” of high-profile influencers or to take a hardline approach with influencers, as the Commission did with native advertising online, represents a parting with the manner with which the Commissions has traditionally enforced the deception standard in endorsement ads. This departure, this Article argues, is undermining the FTC’s consumer protections.

INTRODUCTION

Social media influencers have become a pipeline for merchandise branding, product sales promotion, and advertising campaigns to persuade the masses across a range of platforms.\(^1\) Advertising campaigns driven through social media platforms are inescapable, prefabricated, everyday events.\(^2\) Influencers are

\(^1\) Rochelle Bailis, *The State of Influencer Marketing: 10 Influencer Marketing Statistics to Inform Where You Invest*, BIGCOMMERCE BLOG, https://www.bigcommerce.com/blog/influencer-marketing-statistics/ (last visited Jan. 22, 2021) (“When you want to really scale and when you want to reach new audiences, you need content that makes people WANT you—and that comes from having great content. One of the best ways to get this content is from influencers—they know how to tell a story that fits the social media channel’s objective.”).

everywhere: on people’s timelines and in business strategy.³ To put it mildly, influencer marketing is exploding,⁴ but the law has not kept up.

Indeed, for nearly any hobby, practice, or field of entertainment, there is a corresponding group of influencers whose content reaches an interested audience. These influencers can have enormous reach because of the sheer size of their follower base.⁵ For example, soccer fans may not only have watched Cristiano Ronaldo, but they may be one of his 148 million followers on Facebook.⁶ The same is true of non-traditional sports stars like Turner “Tfue” Tenney who commands 10.1 million followers on Twitch.tv,⁷ or Lee “Faker” Sang-hyeok with nearly 2.8 million followers on Twitch.tv.⁸ Politics is not immune to influencer culture either. For example, President Barack Obama has more than 127 million followers on Twitter.⁹ Pop culture is filled with influencers like Kylie Jenner who has 219 million followers on Instagram, and her sister Kendall Jenner who has 154 million on that platform.¹⁰ Even individuals who otherwise

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³ 20 Surprising Influencer Marketing Statistics, DIGIT. MKTG. INST. (Oct. 25, 2018), https://digitalmarketinginstitute.com/blog/20-influencer-marketing-statistics-that-will-surge-you (indicating that 60% of people have been influenced by influencers before purchasing an item and that two-thirds of marketers promote content via influencer marketing).

⁴ See id. (stating that “Influencer Marketing Has Surpassed Print Marketing”).

⁵ Indeed, there are websites which track users who have the most followers on different social media platforms. See, e.g., The Most Followed Accounts on Twitter, BRANDWATCH, www.brandwatch.com/2Fblog%2Fmost-twitter-followers%2F (last updated Jan. 9, 2021).

⁶ Cristiano Ronaldo (@Cristiano), FACEBOOK, https://www.facebook.com/Cristiano/ (last visited Jan. 22, 2020). This is just his Facebook, and does not include his other follower bases on other social media accounts.


lack traditional celebrity status can become social media influencers, such as Addison Rae who has 77.6 million followers on TikTok\textsuperscript{11} or Dude Perfect who has 55.4 million subscribers on YouTube.\textsuperscript{12}

Along with their pervasive presence, influencers have become an integral part of marketing strategies. And influencers can charge accordingly—a sponsored post from Dwayne ‘The Rock’ Johnson, for example, is valued at just over $1,000,000.\textsuperscript{13} Kylie Jenner’s price tag-per-post is also valued at about $1,000,000.\textsuperscript{14} Though other influencers may charge less per post, the top ten richest influencers on Instagram all make more than $700,000 per post.\textsuperscript{15} Even outside of the payment-per-post realm, regular influencer activity can generate significant profits. For example, “e-sports” influencer Daequan “TSM_Daequan” Loco has been estimated to earn roughly $750,000 a year from Twitch.tv subscriber fees alone, not counting advertisement views or any other built-in tip jar features.\textsuperscript{16}

The popularity of influencers does not end with their followers—it extends to business as well. Influencer advertising campaigns have changed dramatically over the past few years, but the general view that influencer advertising is a successful brand-

\begin{footnotesize}
\begin{enumerate}
  \item Dude Perfect, YouTube, https://www.youtube.com/channel/UCRijo3dMTht_iHyNSNxpNQ (last visited Jan. 22, 2021).
  \item The Rock Ranks as Instagram’s ‘Most Valuable Star’, BBC News (July 2, 2020), https://www.bbc.com/news/business-53261043. Other similar high-grossing influencers include household sports star names like Neymar da Silva Santos Junior and popular culture icons such as Taylor Swift. Id.
  \item Id.; see also Instagram Rich List 2020, HOPPERHQ, https://www.hopperhq.com/blog/instagram-rich-list/ (last visited Mar. 31, 2021) (listing the cost per post of mega-influencers).
\end{enumerate}
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marketing strategy has not changed. Advertisers pay for influencer endorsements because brands and the advertising industry recognize that influencers wield an immense amount of power in the never-ending battle to sell goods. With a potential return on investment of $5.78 for every $1 spent by a brand, influencers have become an integral part of the advertising industry. And there is no indication that the deluge of posts, payments, and sales will slow down given the success of influencers so far.

In the face of the successes of influencer marketing, the FTC has struggled to regulate influencer commercial speech and improve influencer compliance with FTC Act requirements. At the close of 2020, the FTC has issued only one ruling against individual influencers, supplementing its previous issuing of ninety

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18 Bailis, supra note 1.

19 See The State of Influencer Marketing 2020: Benchmark Report, INFLUENCER MKTG. HUB, https://influencermarketinghub.com/influencer-marketing-benchmark-report-2020/ (last updated Feb. 14, 2021) (noting highlights of the continued growth of the influencer age—such as 80% of firms surveyed using their marketing budget to pay influencers); cf. DIGIT. MKTG. INST., supra note 3 (indicating earnings of $6.50 per $1 spent on influencer advertising).

20 See Alexandra Mondalek, Are We in the Golden Age of the ‘Influencer Brand’?, FASHIONISTA, https://fashionista.com/2020/02/influencer-fashion-brands-market (last updated Feb. 18, 2020) (describing a fashion company’s—known as Revolve—notoriety for pairing of influencers with metadata concerning sales, turning individual influencers into household fashion names). But see Laura DeMaude, Is the Golden Age of Social Media Influencers Gone for Good?, JAMMY BEAR (Aug. 29, 2019), https://jammybear.com/is-the-golden-age-of-social-media-influencers-gone-for-good/ (claiming that increased FTC attention in 2019 would spell the end of the golden age of social media influencers). Given the subject of this Article, it is fair to say that Mondalek had, perhaps, the better prediction of the current zeitgeist.


educational letters, and twenty-one follow-up letters to influencers. But this strategy has failed to cause a shift in influencer compliance. While the FTC has gone after a slew of businesses, such as Devumi, Teami, and Machinima, this strategy has not induced sufficient systematic change. For more

against an influencer, and so it is not described as an action against an influencer in this Article. See generally Complaint, FTC v. Nudge, LLC, FTC File No. 182 3016, No. 2:19-CV-00867-RJS (D. Utah Nov. 5, 2019), available at https://www.ftc.gov/system/files/documents/cases/182_3016_nudge_complaint_redacted.pdf.


See Lara O’Reilly, ‘One of Many Stages of Maturity’: Ad Industry Welcomes Instagram Influencer Marketing Labeling Changes, DIGIDAY (Oct. 19, 2020), https://digiday.com/marketing/one-of-many-stages-of-maturity-ad-industry-welcomes-instagram-influencer-marketing-labeling-changes/ (describing Instagram’s “labelled” posts feature, a platform feature unveiled to mark paid promotions and sponsored content). An important discussion in O’Reilly’s article is the possible business repercussions of follower disengagement and algorithm de-prioritization with posts with disclosed material connections through post labelling. While companies may ostensibly be taking precautions to improve disclosure, there appears to be anxiety over the disadvantages of FTCA compliant disclosures. Id. This indicates that while regulating businesses which engage in influencer advertising is an important piece of the puzzle, it cannot be the only piece. Just as interestingly, other influencer marketing firms believe that platforms are likely to be policed by regulation agencies. Id. Recent FTC platform chasing indicates that this is an accurate belief. See FTC Issues Orders to Nine Social Media and Video Streaming Services Seeking Data About How They Collect, Use, and Present Information, FED. TRADE COMM’N (Dec. 14, 2020), https://www.ftc.gov/news-events/press-
than a decade—or better understood, since the influencers-were-usually-bloggers era—28—the FTC has failed to take meaningful action against influencers themselves.

The FTC’s failures to induce influencer’s compliance with FTC endorsement regulations by enforcing against widespread endorsement deception in a relatively new and popular marketplace, through a relatively new and popular marketing strategy, tangibly harms consumers. Empirical research strongly suggests that many consumers do not understand the nature of the influencer process.29 As a result, consumers are tricked into buying products that they think are being impartially endorsed by individual influencers who are anything but impartial.30 In the face of an already nearly $10 billion dollar a year industry,31 the FTC has not been able to effectively protect consumers from influencer non-compliance with its regulations on endorsement disclosure.

The FTC’s ongoing refusal to take meaningful action against influencers who fail to disclose the material connections between themselves and the products they are promoting has created an advertising mechanism engaged in systematic deception. This lack of enforcement functionally undermines the agency’s wider consumer protection authority—its efficacy and potency—under Section 5 (as well as Section 13) of the FTC Act.32


30 Id.

31 INFLUENCER MKTG. HUB, supra note 19, at 7.

As the primary consumer protection administrative agency, the FTC’s lack of action on influencers is not just unsustainable—it is harmful to consumers. Influencers may be mouthpieces, but under any traditional enforcement they should also be considered endorsers who regularly engage in deceptive practices. A cursory examination of most social media platforms can inundate a consumer with a range of false and deceptive claims. With nothing more than a “please stop, or we might say stop again” from the FTC, influencers are operating in a world of unmatched freedom to deceive consumers.

This Article argues that the FTC should deploy a commitment to a strong, and when necessary, aggressive, enforcement stance on influencer content—just as the agency does for other forms of commercial speech. Such a strategy will require enforcement against individual influencers, not just businesses and platforms. The FTC’s failure to “make an example” of serial violating, high-profile influencers is a departure from how the FTC has

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33 In fact, to say that influencers are not part of sophisticated global networks would be to ignore what the FTC has admitted it is up against since before 2016. See Complaint ¶¶ 6–8, Machinima, Inc., 161 F.T.C. 318 (2016) (No. C-4569), available at https://www.ftc.gov/system/files/documents/cases/150902machinima-cmpt.pdf (“Microsoft . . . embarked on a global advertising campaign to promote the Xbox One and new Launch Titles . . . Respondent eventually entered into a written agreement . . . to provide advertising on behalf of Microsoft as outlined in Respondent’s proposal.”). See generally Julie Muncy, FTC Slaps Machinima on the Wrist for Its Paid Endorsements, WIRED (Sept. 2, 2015, 5:34 PM), https://www.wired.com/2015/09/ftc-machinima-microsoft-youtube/ (describing one commentator’s immediate disdain for the FTC’s lack of meaningful punishment against Machinima).

34 See Ari Lazarus, Is That Post #Sponsored?, FED. TRADE COMM’N (Apr. 19, 2017), https://www.consumer.ftc.gov/blog/2017/04/post-sponsored (showing that commenters recognize that the FTC “talks a big talk” but has not taken sufficient action).

35 Id.

36 Brittany Renner’s advertisements for Teami Teas through her Instagram posts are just one example of an influencer’s repeated violations of FTC disclosure requirements. Ms. Renner’s posts are far from the only example, but unlike other disclosure violations, Renner’s violations have been used by the FTC as part of its complaint exhibits and related press release. See Tea Marketer Misled Consumers, Didn’t Adequately Disclose Payments to Well-Known Influencers, FTC Alleges, FED. TRADE COMM’N (Mar. 6, 2020), https://www.ftc.gov/news-
traditionally enforced the deception standard in endorsement advertising. The FTC’s departure from its longstanding efforts to police deception in advertising has undermined its consumer protection authority and left consumers at the whims of influencers producing deceptive online content that the FTC has routinely challenged in other media in the past.

Part I of this Article discusses how influencers have become part and parcel of the advertising industry and explores some social science research about influencer content. Part II explores the FTC’s Section 5(a) authority to enforce deceptive practices. Part III explores the evolution of the FTC’s influencer enforcement case line. Part IV reports a coded analysis of the comments submitted to the FTC’s 2020 review of its endorsement guidelines, including the responses to questions asked by the agency dealing with social media influencer content. Part V proposes that the agency is undermining its consumer enforcement duties and argues that the incoming FTC must launch a policy of active enforcement against the rampant deceptions in the commercial speech being produced by influencers.


For example, the Commission has previously taken hardline approaches against embedded online native advertising. Disclosures: How to Make Effective Disclosures in Digital Advertising, FED. TRADE COMM’N (Mar. 2013), https://www.ftc.gov/sites/default/files/attachments/ftc-staff-revises-online-advertising-disclosure-guidelines/130312dotcomdisclosures.pdf [hereinafter How to Make Effective Disclosures]. Commissioner in the FTC have previously argued in favor of stronger regulation against general online deception, though this has not necessarily been construed to apply to individual influencers. Statement of Commissioner Rohit Chopra, FED. TRADE COMM’N (July 16, 2020), https://www.ftc.gov/system/files/documents/public_statements/1578231/social_bots_chopra_statement.pdf (“We Cannot Trust Tech Platforms to Police This Problem.”); see also Enforcement Policy Statement on Deceptively Formatted Advertisements, FED. TRADE COMM’N 1–2 (Dec. 22, 2015), https://www.ftc.gov/system/files/documents/public_statements/896923/151222deceptiveenforcement.pdf [hereinafter Enforcement Policy Statement] (“The principle that advertising and promotional messages should be identifiable as advertising is found in Commission and staff policy guidance . . . .”).
I. INFLUENCERS—A CONCISE HISTORY

A. Influencers, a New Walking Billboard

Social media influencers have become an integral part of the larger media and advertising ecology.\textsuperscript{38} This is largely because of their unique advertising abilities and mechanics.\textsuperscript{39} With internet users becoming immune to traditional visual advertisements, advertisers began to turn toward organic advertising techniques, such as celebrity endorsements.\textsuperscript{40} These endorsements combine word of mouth marketing with the mass appeal of a celebrity. While streaming platforms like YouTube or Twitch.tv deliver large quantities of influencer produced content, Instagram remains the primary mechanism for the delivery of influencer-driven advertising campaigns.\textsuperscript{41}

Rather than discuss the types of content which appear in various platforms, we propose that for regulatory purposes, an influencer can be defined as an individual who has a material connection to commercial products or services that are endorsed or promoted through social media content to a group of followers. By this definition, a social media influencer is a person who acts as a perceived authority, who has a trusted voice that is perceived to be neutral, and whose voice is functionally that of a paid spokesperson.\textsuperscript{42}

Influencers come in many sizes and are generally categorized into four separate types: mega, macro, micro, and nano.\textsuperscript{43} Mega-

\textsuperscript{38} See, \textit{e.g.}, DIGIT. MKTG. INST., \textit{supra} note 3.

\textsuperscript{39} \textit{Id.}


\textsuperscript{41} See INFLUENCER MKTG. HUB, \textit{supra} note 19 (“87% of respondents use Instagram for influencer marketing . . .”).


\textsuperscript{43} These different levels are not universally agreed upon, and the number of followers required to reach each type is not universally agreed upon either. \textit{Compare} Ismail, \textit{supra} note 14 (stating that nano is 1,000 or fewer followers), with Bella Foxwell, \textit{A Guide to Social Media Influencers: Mega, Macro, Micro,}
level influencers have at least a million followers and are often celebrities or public figures outside of social media.\textsuperscript{44} Mega-level influencers are not always celebrities in the general sense—the influencers may simply be highly followed individuals without any other celebrity status.\textsuperscript{45} Macro-level influencers are typically executives or writers/bloggers in an area. Macro-level influencers have a large base of followers and their opinions are often important to followers within the topical area they are associated with. Micro-level influencers are everyday consumers producing social media content for between one and ten thousand followers. Micro-level influencers are highly sought after by advertisers; these influencers are thought to generate the highest level of brand relevance because their statements seem largely organic.\textsuperscript{46} Nano-level influencers round out the influencer categories and have the smallest following base at one thousand or fewer followers.\textsuperscript{47}

Influence can be quantitatively assessed by one’s ability to influence others and, conversely, how susceptible an audience is to external influence.\textsuperscript{48} Marketers utilizing the services of social media influencers have recognized that while both assessments of influence are important, the latter element is key. An audience’s ability to be influenced flows from its perception of the “mimic-ability” of an influencer’s images—or whether the audience deems the images eminently attainable.\textsuperscript{49} The mimic-ability of an

\textsuperscript{44} See Ismail, supra note 14 (“Mega-influencers are the highest-ranking category of social media influencer, they typically have more than a million followers.”).

\textsuperscript{45} Lorenz, supra note 17.

\textsuperscript{46} See Ismail, supra note 14.

\textsuperscript{47} Gregory A. Nylen, Social Media Influencers as Endorsers: Pitfalls and Best Practices to Avoid the Ire of the FTC, LAWYERS’ MUT. 31, 37 (Apr. 2020), http://www.virtualonlineditions.com/publication/?m=15276&i=655845&p=38; see also Ismail, supra note 14.


\textsuperscript{49} Chung-Wha Ki & Youn-Kyung Kim, The Mechanism by Which Social Media Influencers Persuade Consumers: The Role of Consumers’ Desire to
influencer also plays into the audience’s desire, for any number of rational and irrational reasons, to mimic influencers and their lifestyles.\textsuperscript{50} The end result is that deploying influencers who come off as believable, credible, and mimicable to promote products has become a key strategy for businesses looking to achieve a better bottom line.\textsuperscript{51}

There are currently no signs that the marketing industry is seriously rethinking influencer use.\textsuperscript{52} There is little question that the marketing industry believes that influencer advertising is an effective tactic, with over 90\% of marketers believing that influencer marketing produces return-on-investment is comparable to, or greater than, other marketing methods.\textsuperscript{53} In fact, advertising and public relations professionals indicate the hardest part in using influencers is identifying which influencers to use, rather than


\textsuperscript{50} Chung-Wha Ki, \textit{The Drivers and Impacts of Social Media Influencers: The Role of Mimicry}, TRACE: TENN. RSCH. AND CREATIVE EXCH., UNIV. TENN. 26–27 (2018), https://trace.tennessee.edu/cgi/viewcontent.cgi?article=6611&context=utk_graddiss (“Compliance means conformity, and it refers to the act of adapting to others’ wishes, to a rule, or to necessity. In other words, compliance is a submissive response made in reaction to others’ request or influence appeals. An influencer can encourage a target’s compliance desire by using her power resources that link the influencer’s desired behavior to something that is of value to the target.” (citations omitted)).

\textsuperscript{51} See, e.g., \textit{10 Lessons from Instagram Influencers}, SPROUTSOCIAL, https://sproutsocial.com/insights/guides/instagram-influencers/ (last visited Jan. 22, 2020) (discussing the importance of “Sell[ing] Lifestyle, Not Product” as the method of improving consumer engagement). In fact, the article speaks to the success of simple photos and “longform” captions, which detail stories that are thought provoking contextualized by photos of lifestyles that appear to be entirely attainable. \textit{Id.}

\textsuperscript{52} While there is some indication of the “maturation” of the industry, there is no indication that the advertising business has seriously rethought how it uses interns. See \textit{INFLUENCER MKTG. HUB}, supra note 19 (“Influencer fraud is still of concern to respondents, but less so than in the past.”).

whether or not to use them.\textsuperscript{54} So far, economic analysis of influencer marketing campaigns shows the usage of influencers is justified.\textsuperscript{55}

\textbf{B. Trust, the Fuel of Influencers}

Unironically, in a regulatory regime based around the legal concept of deception, trust remains an important component of the success of social media influencers. Influencers who generate a following also generate trust from their followers.\textsuperscript{56} Research has demonstrated a positive relationship between influencer disclosure, follower trust, and follower interest in the purchase of products promoted through a properly disclosed social media post.\textsuperscript{57} The results of another study indicated that endorsements yielded more positive attitude when recommended by micro-level influencers; even when study participants were shown misleading photos, a higher level of trust of the endorsement from a micro-level influencer remained.\textsuperscript{58} The advertising industry has quickly observed that this trust between influencer and follower is ripe for exploitation. Sadly, one study indicated that three-in-ten influencers

\textsuperscript{54} See DIGIT. MKTG. INST., supra note 3 (stating that major brands expect “an increase in spend, with some 67% of marketers planning to increase their budgets in the next 12 months, particularly on Instagram”). Furthermore while “73% of marketers have a budget set aside for influencer marketing, . . . 67% are actively engaging with and have a relationship with influencers.” Id.

\textsuperscript{55} See 80 Influencer Marketing Statistics for 2020, INFLUENCER MKTG. HUB, https://influencermarketinghub.com/influencer-marketing-statistics/ (last updated Jun. 15, 2020) (indicating that businesses have a $5.20 return-on-investment for every $1 spent on influencer marketing). The top 13% of firms make $20 return-on-investment for every $1. However, some firms generate little to no return on investment. Id.

\textsuperscript{56} See Ki & Kim, supra note 49, at 910 (“Peer consumers today view [social media influencers] as trusted sources of information . . . because they provide information not only about a product/service’s features or quality, but also reviews that detail their personal experiences using it.”).


\textsuperscript{58} Zhang, Kuo & McCall, supra note 29, at 285–97.
have been asked to hide sponsorship disclosure.\textsuperscript{59} This may not be malicious, but instead the result of a marketing firm’s inability to understand the FTC’s guidelines—while two-thirds of marketers are aware of FTC guidelines, only 11% of marketers claim to understand them.\textsuperscript{60} This combination of trust and deception—despite decreasing over the past year—continues to victimize consumers, with one survey indicating that 38% of consumers experience influencer fraud.\textsuperscript{61}

Whether or not the industry is pushing for non-disclosure,\textsuperscript{62} some have argued that the FTC failed at supporting the disclosure guidelines it has provided, suggesting in part that social media influencers are not educated enough to engage in proper disclosure.\textsuperscript{63} One assessment has argued that more training and information is needed, and pointed at results indicating that of 70% of influencers that had attempted to disclose their material relationship, only 25% successfully complied with the

\textsuperscript{59} Christina Sauerborn, Note, \textit{Making the FTC \copyright: An Approach to Material Connections Disclosures in the Emoji Age}, 28 FORDHAM INTL. PROP. MEDIA \& ENT. L.J. 571, 575 (2018) (“While influencers seem to have a better grasp on disclosure requirements . . . three-in-ten influencers reported having been asked by a client or marketer to hide the sponsored nature of their post.”).

\textsuperscript{60} IZEA, supra note 57, at 47.

\textsuperscript{61} See INFLUENCER MKTG. HUB, supra note 19 (indicating a drop from 68% to 38% consumer fraud rate due to influencers). While this drop is both substantial and heartening, it still leaves nearly four in ten consumers at risk, which is hardly cause for celebration. See Zhang supra note 29, at 285–97 (providing similar statistics regarding influencer fraud at a similar rate).

\textsuperscript{62} Alice Audrezet & Karine Charry, \textit{Do Influencers Need to Tell Audiences They’re Getting Paid?}, HARV. BUS. R. (Aug. 29, 2019), https://hbr.org/2019/08/do-influencers-need-to-tell-audiences-theyre-getting-paid (“We find that in any particular year, disclosure makes almost no difference to the impact of the influencer’s recommendation on the purchase decision.”). It should be noted that at least one study has indicated that disclosure does not negatively impact trust rates among influencer follower bases. For example, Audrezet and Charry argue that their surveys indicate that disclosure may improve trust among follower bases, and therefore companies and influencers do not help their bottom-line by refusing to disclose. \textit{Id.}

\textsuperscript{63} Arunesh Mathur, Arvind Narayanan, & Marshini Chetty, \textit{Endorsements on Social Media: An Empirical Study of Affiliate Marketing Disclosures on YouTube and Pinterest, 2 Proc. of the ACM on Human-Computer Interaction (2018).}
requirements. In comparison, native advertising—a type of online advertising the FTC has been quite serious about regulating—now requires a disclosure that is clear and prominent, despite similar concerns about appearance. And the comparison between native advertising online and social media influencer content is not an empty one. Native advertising is hidden or embedded on websites, while influencers who do not comply are functionally hiding sponsored content on their personal pages.

There is substantial evidence that influencers are not following or complying with the FTC’s disclosure requirements. In one assessment of disclosures, only about 10% of affiliate marketing content contained any disclosures at all, with even less meeting the guidelines. Another assessment suggested that influencers were improving, moving from 11% compliance in 2018 to 14% compliance in 2019. Overall, these findings indicate that the FTC’s attempts thus far to curb influencer non-compliance have been unsuccessful.

II. THE FTC’S DECEPTION STANDARD

The FTC is granted the ability to regulate commerce by preventing unfair or deceptive trade practices which harm

67 Mathur et al., supra note 63.
68 INFLUENCER MKTG. HUB, supra note 19.
69 See, e.g., FED. TRADE COMM’N, supra note 21 (explaining FTC authority and disclosure requirements in a consumer-friendly booklet format).
consumers under Section 5(a) of the Federal Trade Commission Act ("FTCA").

Under the language of Section 5, the FTC applies a broadly written, flexibly applied deception standard when reviewing the material claims of advertising. While an extended discussion of deception is outside of the scope of this Article, the FTC has stated that it will find a breach of the deception standard, as outlined in its 1983 policy paper, "if there is a misrepresentation, omission, or other practice, that misleads the consumer acting reasonably in the circumstances, to the consumer’s detriment."

This standard has never required actual injury, however. Instead, only the possibility of deception is required. Under this standard an actor need not actually deceive anyone. Injury instead comes from the possibility of deceiving through acts or practices. The FTC has never ruled that any particular percentage of consumers being deceived definitively indicates that a practice is deceptive. However, the FTC has publicly reaffirmed that a deception rate of 15% is sufficient to demonstrate deception in cases of deceptive advertising.

This somewhat confusing standard—a quasi-objective, but realistically, a subjective standard—was in need of clarification as applied to endorsements. This came in the form of the Endorsement Guides, first promulgated in 1980. While not carrying the force of

73 See Sarah Sluis, FTC: Publishers Will Be Held Responsible for Misleading Native Ads, AdEXCHANGER (June 3, 2015, 3:15 PM), https://www.adexchanger.com/publishers/ftc-publishers-will-be-held-responsible-for-misleading-native-ads/ ("An ad is deceptive if it misleads a significant percentage of consumers . . . . [Engle] clarified that usually means 15% of consumers, and sometimes as few as 10% of consumers."). The origin of this percentage is likely Firestone. See Firestone Tire & Rubber Co. v. Fed. Trade. Comm’n, 481 F.2d 246, 249 (6th Cir. 1973) (“We find it hard to overturn the deception findings of the Commission if the ad thus misled 15% (or 10%) of the buying public.”).
74 16 C.F.R. § 255.0 (2021).
law, the Enforcement Guides clarify how the FTC enforces the deception standard.\textsuperscript{75} The initial purpose of the Endorsement Guides was to give guidance to the advertising industry about how to handle celebrity endorsements.\textsuperscript{76} These celebrity endorsements often took the form of appearing in an ad for a company or mentioning a product on air.\textsuperscript{77}

Initially in the 2000s, bloggers were the social media advertising issue.\textsuperscript{78} Sponsored blog posts appear among the other unsponsored content from a particular blogger and may look and read like their own posts.\textsuperscript{79} While previously celebrities would appear on behalf of a company, the introduction of blogger endorsements wove advertisements into an otherwise impartial-seeming personal feed of media. Additionally, it was not clear if the endorsers would even be liable for the statements made at the request of an advertising agency.\textsuperscript{80} Without clear liability, blog posts could be solicited word-of-mouth advertisements that appeared as otherwise indistinguishable from other impartial posts. These features, and others, compelled the FTC to update the Endorsement Guides in 2009\textsuperscript{81}—nearly three decades after first promulgation—to address the new age (and now ancient methods) of internet-based advertising.

In the FTC’s own words, the Guides were meant to enforce the law so that consumers could trust what they see in social media: “Moreover, to the extent that consumers’ willingness to trust social media depends on the ability of those media to retain their credibility as reliable sources of information, application of the general principles embodied in the Guides presumably would have a

\textsuperscript{75} See, e.g., State v. Amoco Oil Co., 293 N.W.2d 487, 495–96 (Wis. 1980).

\textsuperscript{76} Feinman, supra note 40, at 121.

\textsuperscript{77} Id. at 105–10.

\textsuperscript{78} See How to Make Effective Disclosures, supra note 37, at 4 n.10 (“[W]hen the Endorsement Guides were reviewed in 2009, examples involving blogs were included, to make clear that the FTC Act applies to this then-new form of social media marketing.”).

\textsuperscript{79} Chan, supra note 64, at 314–15.


\textsuperscript{81} Chan, supra note 64, at 316.
beneficial, not detrimental, effect.”82 In fact, the promulgation of the updated Guides in 2009 specifically stated that industry self-regulation would be insufficient to maintain trust in the virtual marketplace: “[A]lthough industry self-regulation certainly can play an important role in protecting consumers as these new forms of marketing continue to evolve and new ones are developed, self-regulation works best when it is backed up by a strong law enforcement presence.”83

The nitty-gritty of the Enforcement Guides is critical to understanding the make-up of influencer enforcement opportunities. According to the Guides, an endorser is “[t]he party whose opinions, beliefs, findings, or experience the message appears to reflect . . . and may be an individual, group, or institution.”84 For the purpose of the Guides, endorsers are a broad category. And this choice makes sense, since as the examples show, modern commercial media can take a variety of forms, formats, voices, and speakers.85

The endorsement standard, codified in the Endorsement Guides, defines “endorsement” broadly to mean “any advertising message.”86 The Guides indicated that breadth in expounding on what constitutes “advertising,” including “verbal statements, demonstrations, or depictions of the name, signature, likeness or other identifying personal characteristics of an individual or the name or seal of an organization.”87

An endorsement doesn’t have to mean that a statement was actually intended as an endorsement by the endorser.88 Formalistically understood, to be treated as an endorsement, one must merely make a statement “that consumers are likely to believe reflects the opinions, beliefs, findings, or experiences of a party other than the sponsoring advertiser.”89 Under this standard, the statement merely needs to be one that a consumer, acting as a

83 Id.
84 16 C.F.R. § 255.0(b) (2021).
85 Id. exs. (a)–(f).
86 Id. § 255.0(b).
87 Id.
88 Id.
89 Id.
reasonable consumer in the circumstances—would likely believe is an endorsement. In response to public comment about the supposed uncertainty this would cause, the FTC stated outright that the Guides “focus[] on the message consumers take from the speech at issue.”

The extent to which this applies in the contemporary influencer world is somewhat unsettled. In the Federal Register responses, the FTC suggested some hesitation attaching this standard to anyone making a positive statement about a brand or product. The FTC instead stated it would opt to utilize what is an apparently unincorporated test concerning whether the speaker is: “(1) acting solely independently, in which case there is no endorsement, or (2) acting on behalf of the advertiser or its agent, such that the speaker’s statement is an ‘endorsement’ that is part of an overall marketing campaign.” Though this Article does not discuss this issue at length—as the influencers and influencing being discussed here are nearly universally part of some compensation scheme—this test does not seem as intuitive as perhaps the FTC originally believed. This is especially the case because the Guides indicate that the endorsement definition includes endorsements honestly believed by the endorser that “are identical to those of the sponsoring advertiser.” Muddying these waters even more, the endorsement standard treats testimonial statements as identical to endorsements.

More straightforwardly, endorsements have some basic substantive requirements. They must not be lies; that is, “[e]ndorsements must reflect the honest opinions, findings, beliefs, or experience of the endorser.” This sets the bar high for endorsement deception. Statements that even distort the truth are considered deceptive under this standard. In effect, this means that

90 Id.
92 Id. at 53,126.
93 Id.
94 16 C.F.R. § 255.0(b) (2021).
95 Id. § 255.0(c).
96 Id. § 255.1(a).
97 Id. § 255.1(b).
individuals stating something they believe in order to sell a product, even if they are not intending to make an endorsement, must be telling their subjective truth. If they are touting an experience with that product, then the experience being told must reflect that subjective truth as well. As this Article will indicate, this is at odds with the history of endorsements, endorsement enforcements, and the magical world of influencers. But more than just telling their subjective truth, endorsers cannot say anything that is not objectively true from the brand’s standpoint either. Endorsements by an endorser about a product are deceptive just as they would be deceptive had they been made by the business or manufacturer. Constrained between telling their own subjective truth and the brand’s objective truth, the Enforcement Guides’ manifest intent is to ensure that consumers are fed only honest opinions.

The FTC’s intent in clarifying the duty to be truthful in endorsements is evident in the Federal Register comments. These comments indicate that failure to be truthful by the terms set by the Enforcement Guides would meet with penalties for both the company and the endorser. While the FTC’s 1980 Enforcement Guides were ambiguous on this matter, the 2009 Enforcement Guides contained language the FTC affirmatively stated was intended to put endorsers on notice of this liability. The FTC’s

98 Id.
99 See discussion infra Part III.
100 16 C.F.R. § 255.1(a) (2021).
101 See Guides Concerning the Use of Endorsements and Testimonials in Advertising, 74 Fed. Reg. 53,123, 53,127 (Oct. 15, 2009) (codified at 16 C.F.R. § 255 (2021)). (“The Commission is revising new Example 5, however, to clarify that both the advertiser and the blogger are subject to liability for misleading or unsubstantiated representations made in the course of the blogger’s endorsement.”).
102 Id. at 53,127–28 (“The 1980 Guides did not explicitly state that endorsers, as well as advertisers, could be liable under the FTC Act for statements they make in an endorsement. To make that potential liability more apparent to those who might be considering making an endorsement (and to those counseling prospective endorsers), the Commission’s proposed revised Guides included new language in Section 255.1(d) stating that ‘Endorsers . . . may be liable for statements made in the course of their endorsements.’ The Commission’s proposal also included several new examples featuring celebrities and experts.”).
language in Section 255.1(d) makes clear this intent: “Endorsers . . . may be liable for statements made in the course of their endorsements.”103 Furthermore, the FTC did not view this as putting celebrity endorsers through any form of excessive scrutiny for their statements. Instead, the FTC explained that “th[e] new provision merely ‘explicitly recognizes two principles that the Commission’s law enforcement activities have already made clear,’ one of which is ‘that endorsers may also be subject to liability for their statements.’”104

The FTC’s hardball verbiage did not end there. It explicitly stated that “[a]n advertisement employing endorsements by one or more consumers about the performance of an advertised product or service will be interpreted as representing that the product or service is effective for the purpose depicted in the advertisement.”105 By this view the FTC stated that when a consumer endorsement is made, the brand must be able to substantiate the claim made.106 Furthermore, the FTC takes the statement on its face: if the endorser makes a statement and a consumer acting reasonably in the circumstances could believe that the statement is likely to be true, then the product must live up to that standard.107

Furthermore, the FTC requires parties (persons, partnerships, or corporations) to disclose “material connections” “clearly and conspicuously.”108 “Material connections” means any relationships that would impact the weight or credibility that the audience gives the endorsement. Disclosures must also be clear—i.e., the audience must be able to easily read the disclosure.109 This standard applies to claims made by endorsers ranging from consumers to celebrities to experts and expert agencies.110 In today’s climate of online

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103 16 C.F.R. § 255.1(d) (2021).
105 16 C.F.R. § 255.2(a) (2021).
106 Id. § 255.2(b).
107 Enforcement Policy Statement, supra note 37, at 1.
109 See id. at 487 n.19.
endorsement, the FTC specifically intended to target endorsers as the ones likely needing to disclose—as opposed to brands—because of the fluidity and ease of online publication of endorsements.111 While disclosure by endorsers takes on a heightened level of importance, following from the FTC’s dual liability view of endorsement liability attaching to both sponsors and endorsers, the Enforcement Guides were also intended to ensure that marketers take care to ensure “full disclosure” by their endorsers.112

Non-disclosure of material connections is not always deceptive. Omissions are deceptive when: (1) the “information necessary to prevent a reasonable expectation or belief from being misleading is not disclosed,” and (2) “consumers are likely to have chosen differently but for the deception.”113 Unfortunately, because of the difficulty in assessing just what a reasonable individual might think, the FTC has given seemingly conflicting examples of how it intends to enforce the rules in the Enforcement Guides.

III. FTC ENFORCEMENT ON INFLUENCE AND INFLUENCERS—A CONCISE HISTORY

A. Lunada and the Blog Baseline: Influencers as Bloggers Posting Opinions

In FTC v. Lunada Biomedical, Inc., the FTC brought an enforcement action against a drug company that sold “Amberen,” which was purported to cause weight loss among pre-menopausal

111 See Guides Concerning the Use of Endorsements and Testimonials in Advertising, 74 Fed. Reg. 53,123, 53,134 (Oct. 15, 2009) (codified at 16 C.F.R. § 255 (2021)). (“The recent creation of consumer-generated media means that in many instances, endorsements are now disseminated by the endorser, rather than by the sponsoring advertiser. In these contexts, the Commission believes that the endorser is the party primarily responsible for disclosing material connections with the advertiser.”).


113 Fed. Trade Comm’n, supra note 72.
and menopausal women.\textsuperscript{114} In order to advertise Amberen, Lunada entered into an agreement with International Marketing Company (“IMC”), in which Lunada agreed to pay IMC $2,000 per month as well as daily and hourly fees.\textsuperscript{115} That agreement included a provision in which IMC would operate a blog featuring Amberen.\textsuperscript{116} Pursuant to the agreement, in December 2009 IMC began operating “Ask Carol: A Menopause Blog” (“Carol’s Blog”).\textsuperscript{117} Carol’s Blog’s posts were actually based upon IMC’s president’s own experiences with menopause.\textsuperscript{118} That blog endorsed Amberen as a product that “provided relief for her menopause symptoms, including weight gain, hot flashes, irritability, and sleeplessness.”\textsuperscript{119} Carol’s Blog even included IMC’s president’s background as a nurse, promoted Amberen as a “safe alternative” to hormone replacement therapy, and even included a toll-free number to procure Amberen.\textsuperscript{120}

No disclosure of the material connection between the blog, its writer, and the drug manufacturer were provided.\textsuperscript{121} In its stipulated order for permanent injunction, the court enjoined Lunada from future prohibited representations regarding drug benefits and required disclosure of material connections between Lunada and its endorsers.\textsuperscript{122}

\textit{Lunada} presents modern deceptive influencing under the guise of the \textit{old} issue of blogging. Carol’s Blog masqueraded as a blog, but actually was more akin to contemporary influencer advertising

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\textsuperscript{115} \textit{Id.} at 5.
\textsuperscript{116} \textit{Id.} at 5–6.
\textsuperscript{117} \textit{Id.} at 5.
\textsuperscript{118} \textit{Id.}
\textsuperscript{119} \textit{Id.} at 6.
\textsuperscript{120} \textit{Id.}
\textsuperscript{121} \textit{Id.} at 18, 22; see generally \textit{id.} at 56–57.
\end{flushleft}
campaigns. Carol’s Blog was professionally created to appeal to and build rapport with a specific demographic through carefully constructed personal stories while pushing native advertising. While Carol’s Blog does not aesthetically resemble influencer deception, it did roughly the same thing—present advertising material masked as personal opinions from a trustable source, without proper disclosure, for monetary gain.

Lunada provides an indication of what content and which parties the FTC previously felt comfortable enforcing against. Reasoning from the blog-baseline—that only the company that benefits from the disclosure violations should be enforced against—the FTC did not enforce against IMC. Despite IMC being a professional advertising agency and a sophisticated party, the FTC chose not to do so. The FTC’s unstated, baseline assumption was that businesses, and not individual bloggers, are engaged in deceit. Lunada shows that this reasoning is largely inapplicable to effectively regulating sophisticated influencer marketing.

B. Machinima: Enforce Against Companies, Make Companies Police Influencers

In In re Machinima, Inc., the FTC brought an enforcement action against Machinima, a video game video production

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123 Complaint, supra note 114, at 56–57 (indicating the imagery of the blog). This is not to say that one could view Lunada’s Carol’s Blog as akin to the blog baseline because it is a blog. Even under that view, Carol’s Blog indicates what the FTC was previously comfortable with and how the FTC has unsuccessfully transitioned to enforcement against influencers.

124 Id. at 6.

125 Id. at 58–59.

126 See generally id. (lacking any enforcement against IMC); see also Stipulated Order, supra note 122 (failing to mention IMC’s role in the press release); Marketers of Dietary Supplement Amberen Settle FTC Charges Regarding Misleading Weight-Loss and Menopause Relief Claims, FED. TRADE COMM’N (May 20, 2016), https://www.ftc.gov/news-events/press-releases/2016/05/marketers-dietary-supplement-amberen-settle-ftc-charges-regarding.

127 Complaint, supra note 114, at 5.

company. In 2013, Machinima approached Microsoft and its advertising partner, Starcom, to market the Xbox One console and a variety of the titles that would launch upon the Xbox One release. The plan to advertise the console contained two parts. In phase one, five influencers under Machinima’s banner would each produce two videos to talk positively about the Xbox One and the launch games. The videos had no disclosures about the compensation that the video-makers would receive. In phase two, Machinima gave influencers $1 for every 1,000 views until Machinima had paid out $25,000. In order to join the second phase of the campaign, an influencer was required to sign a Video Campaign agreement including requirements that each video include thirty seconds of Xbox One and launch games in the first two minutes of the video. It also required there to be no negative content concerning Machinima, Xbox One, or the launch titles. Influencers produced more than three hundred videos under phase-two terms. In its Decision and Order, the FTC required, among other things, that Machinima establish influencer disclosure requirements as well as a system for monitoring influencer activity.

The takeaway from Machinima is two-fold. First, the FTC’s baseline view of online deception as an issue of blogging, and not influencers, shines through in Machinima. For example, even though the Decision and Order used the term “influencer” in its

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131 Id. at 2–3.
132 Id. at 2.
133 Id. at 3.
134 Id.
135 Id. at 4.
136 Id.
consumer blog, the FTC still referred to the video game YouTubers as “bloggers” in 2015. 138 This could not have been farther from the reality. In that same blog, the FTC acknowledged that Machinima, a company, generated billions of views per month. 139 But it did not recognize that Machinima’s gaming content came from a collective of individual gamer-YouTubers who each had their own followings as part of a larger community within YouTube. 140 The influencers themselves were affiliated with Machinima and were already popular figures within the Machinima community—they were not wholly uninformed, unsophisticated parties. For example, one of the “bloggers,” Tom Cassell, 141 received $30,000 for videos receiving 730,000 views and 300,000 views, respectively. 142 Yet the FTC treated Machinima, the company, as solely the culprit and solely responsible for enforcing and monitoring future disclosures.

Second, Machinima calls into question the efficacy of the view of some commentators that influencers should be able to show their own personal opinions without having to make a disclosure. It is highly likely that the gamers that were called on to promote Machinima, the Xbox One, and the slew of games were not going to disparage some or any of the list in any case. 143 Their position as

138 Alvaro Puig, FTC: Video Reviews of Xbox One Were Deceptive, FED. TRADE COMM’N (Sept. 2, 2015), https://www.consumer.ftc.gov/blog/2015/09/fc-video-reviews-xbox-one-were-deceptive; see also FED. TRADE COMM’N, supra note 22.

139 See Puig, supra note 138 (‘‘Machinima, the operator of a popular YouTube network with 3 billion monthly video views . . .’’).

140 Onanuga, supra note 129.


142 Complaint, supra note 130, at 3.

143 In general, Machinima’s gaming content was not negative towards a specific game. In fact, the channel contained content that praised games in an informal and gaming community centered way. See, e.g., Archive: Call of Duty XP 2011—Team Respawn Explores COD XP! Stark, Hutch, SeaNanners, Tejbz, YOUTUBE (Kaminiage Apr. 11, 2019), https://www.youtube.com/watch?v=Rd3u9IzYlh4 (giving an accurate depiction of a type of video that would have been posted as part of the Machinima page as part of a community project). Machinima had multiple sections of its video production, one of which was called “Respawn” which featured gameplay from the Call of Duty game series, which formed the foundation for some gaming influencers’, like Tom Cassell’s, careers.
gamer-influencers within the Machinima community meant that the gamers not enforced against were likely to buy an Xbox One and play games built for the console as part of their standard influencer fare. It is possible that the views described would have been the personal views of the gamer-influencers had they not participated. Nonetheless, that possibility is not the reality, and the origin of the beliefs matters. The mere fact that the views expressed could have actually been their views does not detract from the actual fact that the gamers were engaged in an advertising campaign, they were paid to do so, and the non-disclosure of these facts meant that those gamers—not just Machinima—were deceiving their fanbase (including minors).

C. Lord & Taylor: Machinima Redux

In In re Lord & Taylor, LLC, the FTC brought an enforcement action against Lord & Taylor for its deceptive marketing of the “Paisley Asymmetric Dress,” which was sold under its “Design Lab” label. In that action, the FTC stated that Lord & Taylor had developed plans to market its dress through a social media campaign it called a “product bomb” that was launched in March of 2015. The FTC described the campaign as “comprised of Lord & Taylor-branded blog posts, photos, video uploads, native advertising editorials in online fashion magazines, and use of a team of fashion influencers recruited for their fashion style and extensive base of followers on social media platforms.” That campaign utilized both influencer marketing as well as marketing through Nylon


144 See Blame Truth—the CODFather, What Happened to Machinima Respawn? (Black Ops 3 Gameplay), YOUTUBE (June 30, 2016), https://www.youtube.com/watch?v=9MI-LJ2eQFo; see also Tejbz, Modern Warfare 2 SeaNanners Dual Commentary—Team Deathmatch Afghan ACR, YOUTUBE (Jan. 16, 2010), https://www.youtube.com/watch?v=p7my67Teh0.


146 Id.

147 Id.
Magazine. In making social media posts, Lord & Taylor “did not require the influencers to disclose in their postings that the company had compensated them, nor oblige the influencers to disclose that they had been compensated.” The FTC imposed a twenty-year order precluding, among other things, Lord & Taylor’s future failure to adequately disclose material connections and affiliation with influencers who make online misrepresentations. Once again, no punishments were imposed on the influencers who participated in the campaign.

Lord & Taylor presents a scenario where the FTC’s Machinima standard of business self-enforcement could have been viable. Similar to Machinima, Lord & Taylor’s “product bomb” used influencer marketing over social media to disseminate native advertising. But Lord & Taylor was much more involved than Machinima in its implementation of the “product bomb.” Lord & Taylor coordinated gifting the dress to fifty “select fashion influencers” and then paid those influencers between $1,000 and $4,000 to post “one photo of themselves wearing the Design Labs dress during a specified time frame” in March of 2015. While the influencers were free to style the dress as they liked, “Lord & Taylor contractually obligated them to exclusively mention the company using the ‘@lordandtaylor’ Instagram user designation . . .” Influencers were also required to use the campaign hashtag

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148 See id. at 2 (discussing Nylon Magazine’s part in the marketing campaign).
149 See id.
151 See generally id. (refusing to impose sanctions on the involved influencers).
153 See Complaint, supra note 145, at 2 (describing Lord & Taylor’s posting requirements in contracts, including a pre-post oversight).
154 See id. at 2.
155 See id.
“#DesignLab” in the caption as well as tag Lord & Taylor using its user designation in the photo.\footnote{\textit{Id.}} Lord & Taylor even required pre-approval of influencer posts.\footnote{\textit{Id.}} Without addressing whether the FTC should be allowed to order disgorgement and restitution of funds, Machinima’s standard as applied in \textit{Lord & Taylor} amounts to a two-strike standard, where one violation does little but require that a violator follow the law, which was the requirement before the violation. Lord & Taylor \textit{could} have followed deception laws; it chose not to, and it was rewarded with 11.4 million collective user views, 328,000 post engagements with native advertising, and a sold-out product.\footnote{\textit{Id.}} Lord & Taylor’s punishment was an injunction on further violations, with no monetary penalties assessed.\footnote{\textit{Id.}}

\textbf{D. Warner Bros. Home Entertainment: Machinima Blows Up in the FTC’s Face.}

In \textit{In re Warner Bros. Home Entertainment, Inc.},\footnote{\textit{Id.}} the FTC pursued an enforcement action under Section 5(a) authority against Warner Bros. Home Entertainment (“WBHE”) for its contract with Plaid Social Labs LLC (“Plaid Social Labs”) to conduct a marketing campaign centered around gaming influencers on YouTube.\footnote{\textit{Id.}} Plaid Social Labs coordinated this campaign—appropriately called the “YouTube Influencer Campaign”—which focused on promoting the upcoming video game title \textit{Middle Earth: Shadow of Mordor}.\footnote{\textit{Id.}} To promote the game, Plaid Social Labs hired notable YouTube gaming influencers to promote the game.\footnote{\textit{Id.}} Those YouTubers agreed to specific conditions in return for compensation, including that their

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\item \textit{Id.}
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video “feature gameplay” of *Shadow of Mordor*, that they have a “strong verbal call-to-action” to click a description box hyperlink to the video game’s website, and that they make one Facebook post or Tweet “in support of [their] video.”¹⁶⁴ Importantly, the influencers were to “promote positive sentiment” about the video game and were not to promote “negative sentiment” about the game, the game publisher, or affiliated businesses.¹⁶⁵ In return, influencers received free, pre-release access to the game, as well as hundreds to thousands of dollars in payment for their video and social media post.¹⁶⁶ While Plaid Social Labs required that the influencers give a disclaimer in the description box of their video, it was not conspicuous—this was similarly true for the influencers’ related social media post about the video. The campaign generated more than 5.5 million views.¹⁶⁷

There are two important takeaways from *Warner Bros*. First, Plaid Social Labs was not enforced against.¹⁶⁸ Though in a later case, *Inside Publications*, a middle-man marketing firm was enforced against for having been a material agent in creating the deceptive influencer campaign, here Plaid Social Labs—having taken on a seemingly identical role—was not enforced against at all.¹⁶⁹ This shows that FTC enforcement has taken at least one (small) step forward in bringing enforcements against those responsible for influencer deception since *Warner Bros.*¹⁷⁰

Second, *Warner Bros.* puts the nail in the coffin for the *Machinima* standard’s workability. While the influencers in this campaign go largely unmentioned in the agency’s enforcement action, the influencers in this case are not unsophisticated parties and they were required by the terms of their agreement to include

¹⁶⁴ *Id.* at 2.
¹⁶⁵ *Id.*
¹⁶⁶ *Id.*
¹⁶⁷ *Id.* at 3.
¹⁶⁹ *Id.*
disclosures in their posts.\textsuperscript{171} In effect, not only were influencers not enforced against for failing to conspicuously disclose, some influencers were given a pass for their failure to even follow disclosure requirements they had agreed to use.\textsuperscript{172} While the influencers were subject to post pre-approval by WBHE or Plaid Social Labs,\textsuperscript{173} the influencers selected were popular gaming community figures with large bases of subscribers and followers.\textsuperscript{174} These individual gaming influencers were not unsophisticated parties—they were seasoned professional video game entertainers.\textsuperscript{175} Viewed with this background, it is odd that the FTC felt at ease exclusively faulting Warner Bros. for the failure of professional influencers to disclose their connections, even when a group of those professional influencers failed to follow their contract by including the full disclosure required by Plaid Social Labs.

E. CSGOLotto: The FTC Gets It Right, but Only Kind Of

In \textit{In re CSGOLotto, Trevor Martin, and Thomas Cassell}, the only case where influencers themselves had an action brought against them, Martin and Cassell owned CSGO Lotto, a gambling

\textsuperscript{171} See Complaint, supra note 161, at 2–3.
\textsuperscript{172} Id. at 3.
\textsuperscript{173} Id.
\textsuperscript{174} For example, the exhibits indicate that the influencers chosen included PewDiePie and SivHD, among others, both of which had significant follower bases at the time and could generate hundreds of thousands to millions of video views. See Exhibits A1–D2, \textit{Warner Bros.}, 162 F.T.C. 1040 (No. C-4595), available at https://www.ftc.gov/system/files/documents/cases/161811_warner_bros_complaint_exhibits.pdf.
\textsuperscript{175} Though SivHD or PewDiePie were unlikely themselves to be familiar with disclosure laws, both are sophisticated parties that could be expected to recognize the importance of complying with disclosure laws or contract with attorneys knowledgeable on the issue. See, e.g., GameJunky0826, \textit{What Ever Happened to SivHD?}, REDDIT (Sept. 16, 2016), https://www.reddit.com/r/leagueoflegends/comments/533hyk/what_ever_happened_to_sivhd/; Kevin Roose, \textit{What Does PewDiePie Really Believe?} N.Y. TIMES MAGAZINE (Oct. 9, 2019), https://www.nytimes.com/interactive/2019/10/09/magazine/PewDiePie-interview.html.
site. The site facilitated the gambling of “skins” from an online shooter game known as Counter-Strike: Global Offensive, and charged an 8% fee on the bets. Martin and Cassell posted on their personal YouTube channels as users of this website without disclosing their ownership of it. Martin “discovered” the website in a video and claimed he won $69 in a bet. He then went on to talk about how nice the owners were on Twitter as well as the possibility of a future sponsorship. The pair continued posting videos with large sums of money listed in the title, including values of $13,000 and $24,000. Neither ever disclosed their ownership of the site. In response, the FTC enjoined the influencers from, among other things, failing to disclose their connections in future endeavors clearly and conspicuously, and required that all use of endorsers be monitored, with clear guidance to endorsers to disclose their material connections.

CSGOLotto can be seen as a step forward for the FTC. Rather shockingly, CSGOLotto is the only cases where influencers themselves have been enforced against by the FTC. Because the

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177 Id. ¶ 6.

178 Skins, which can be bought and sold for real world money, are specific colorations of in-game assets (like guns, knives, etc.) and have generated an out-of-game market. See, e.g., Operation Broken Fang Case, CS:GO STASH, https://csgostash.com (last visited Mar. 19, 2021). See also Jacob Wolf, Federal Trade Commission settles with Owners of CSGO Lotto, ESPN (Sept. 8, 2017), https://www.espn.com/esports/story/_/id/20635149/federal-trade-commission-settles-owners-csgo-lotto (“Eilers & Krejcik Gaming and Narus Advisors estimated that skin betting was a $5 billion marketplace in 2016 . . . .”).

179 Complaint, supra note 176, ¶ 7, 9; see also, Marie Antoinette, How to Win $13,000 in 5 Minutes CS GO Betting(Tmartn Deleted Video), YOUTUBE (July 4, 2016), https://www.youtube.com/watch?v=1v6t6iqhoSI.

180 Complaint, supra note 176, ¶ 9.

181 Id.

182 Id. ¶ 27.


184 See FED. TRADE COMM’N, supra note 22 (stating that this was the first ever enforcement against individual influencers).
FTC acknowledged that the influencers had used their popularity and trust within their follower base to deceive individuals, it took a step towards enforcement against influencers for their own part in the deception. In doing so, CSGOLotto indicates that the FTC not only acknowledged influencers’ agency in violating the law, but recognized the value in enforcing against those violations.

But CSGOLotto is not that clear of a step forward from Machinima. In CSGOLotto, the FTC may have enforced against influencers, but it did so because the influencers were themselves the owners and operators of a deceptive company. In fact, other gaming influencers were hired by the respondents, all of whom were well-established influencers (and paid accordingly), and none of whom were enforced against. The key difference regarding CSGOLotto is the influencers’ ownership in the company. As in other cases, the contracted influencers were not enforced against while the ownership of the company was. So while the FTC acknowledged the importance of Cassell and Martin’s influencer status to the operation of the deceptive scheme, it is unclear whether the pair would have been enforced against had

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186 See generally Decision and Order, supra note 183; see also Charlie Hall, CSGO Lotto’s Lawyer Says It Was Never a Gambling Site, and Here’s Why, POLYGON (Dec. 18, 2017), https://wwwpolygon.com/2017/12/18/16782124/csgo-lotto-lawsuit-gambling-terms-of-use-tmartin.
187 Complaint, supra note 176, ¶ 20.
188 See, e.g., GoldGloveTV, YOUTUBE, https://www.youtube.com/goldglovetc (last visited Jan. 22, 2021) (boasting 1.2 million followers, just on YouTube, at the time of this publication). Payments involved ranged from $2,500 to $55,000 for advertising the website. Complaint, supra note 176, ¶ 19.
189 See generally Decision and Order, supra note 183. Ironically, in the press release, past FTC Commissioner Olhausen stated, “[c]onsumers need to know when social media influencers are being paid or have any other material connection to the brands endorsed in their posts.” FED. TRADE COMM’N, supra, note 23. In fact, then-acting commissioner Olhausen went further to state, “This action, the FTC’s first against individual influencers, should send a message that such connections must be clearly disclosed so consumers can make informed purchasing decisions.” Id. Yet, as explained, the actual enforcement does not reflect this sentiment.
190 See Complaint, supra note 176, ¶¶ 2–3.
191 See discussion infra Part III, Sections F–G.
they simply been contracted to do exactly what they did by an outside party.

F. Telomerase: The Backslide Begins

In *In re Telomerase Activation Sciences, Inc.*,¹⁹² the FTC pursued an enforcement action against Telomerase Activation Sciences (“TAS”), a company that sold what were purportedly anti-aging drugs.¹⁹³ In the process of selling those drugs, TAS utilized ads, endorsers, and even TV hosts to push their product.¹⁹⁴ The campaign included a stint on the *Suzanne Show* for the cost of $89,000.¹⁹⁵ That show was hosted by Suzanne Somers.¹⁹⁶ During that segment, both individuals representing TAS and Suzanne Somers spoke about the positive effects of the company’s anti-aging products, in what essentially amounted to a paid-for, segment-length commercial for TAS’ products.¹⁹⁷ However, it was never disclosed that the segment was paid for.¹⁹⁸ Even after the segment was finished airing, the *Suzanne Show* agreed to continue to feature the drugs in its advertising campaigns.¹⁹⁹ The FTC brought an enforcement action against TAS for false establishment, false efficacy, as well as claims for deceptive format and failure to disclose material connections, among other claims.²⁰⁰

¹⁹⁴ See, e.g., id. ¶¶ 9, 27, 31.
¹⁹⁵ Id. ¶ 26.
¹⁹⁶ Id.
¹⁹⁸ Complaint, supra note 193, ¶ 32.
¹⁹⁹ Id. ¶ 28.
²⁰⁰ See generally id. ¶¶ 42–55.
Returning to the pre-\textit{CSGOLotto} trend, the FTC did not enforce against Somers.\textsuperscript{201} \textit{Telomerase} can be viewed as somewhat confirming the suspicion that had Martin and Cassell not been the operators of the deception—in other words, had they merely been influencers contracted to work their influencer magic—the FTC would not have enforced against them.

\textit{Telomerase} goes beyond this conclusion and indicates a significant backslide. While the FTC brought a count against TAS for providing the means and instrumentalities to deceive against the company, it did not pursue any action against Somers.\textsuperscript{202} If any influencer should have known that their non-disclosure was deceptive, it would have been Somers. After all, Somers was (and is) a seasoned TV personality, and not an unsophisticated party.\textsuperscript{203} Whether or not Somers knew that the product was faulty, it would be difficult for her \textit{not to have} understood that she was failing to disclose a material connection to the individuals and the product that she was broadcasting to her audience.\textsuperscript{204} That the FTC’s complaint discusses her participation at length and indicates she furthered that deception for her own gain, but lets her go unpunished, is irrational and asymmetric.\textsuperscript{205}

\textbf{G. Creaxion: The Backslide Continues}

In \textit{In re Creaxion Corporation}, and its related case, \textit{In re Inside Publications, LLC},\textsuperscript{206} the FTC brought an enforcement action against Inside Publications and Creaxion Corporation.\textsuperscript{207} Creaxion


\textsuperscript{202} See Complaint, supra note 193, ¶ 53–55.


\textsuperscript{204} See Complaint, supra note 193, ¶ 41.

\textsuperscript{205} See id. ¶¶ 26–33.


\textsuperscript{207} See \textit{generally} Complaint, Creaxion Corp., FTC File No. 172 3066 (Nov. 13, 2018), available at https://www.ftc.gov/system/files/documents/cases/172_
was enlisted by a company called HealthPro Brands to market and promote HealthPro’s mosquito repellent in the face of the worldwide Zika outbreak. Creaxion operated as a broker between HealthPro and Inside Publications, and the three parties agreed to a “Social and Digital Media Activation and Athlete Engagement agreement” in which Inside Publications agreed to, among other things, publish two articles praising the mosquito repellent, create a gift basket with the mosquito repellent that would be given to American Olympians, and utilize ex-Olympian influencers as endorsers and supply those influencers with pre-written posts. In its complaint the FTC alleged, among other violations, that no disclosure was given that would indicate that endorsers were not offering their independent, impartial opinions and no disclosure of material connections between the influencers, the publisher, and the product were disclosed.

The FTC focused on the culpability of Creaxion and Inside Publications for the deceptive and misleading statements made by the two contracted influencers. The exhibits outlined in the complaint itself show scripted media advertising. But a closer look at the full list of exhibits shows that the influencers had creative license over what they said. For example, the exhibits show, in addition to the scripted posts, more creative posts by the contracted influencers that contain exorbitant claims—such as Carly Patterson’s comment that the mosquito repellent protected her from Zika carrying mosquitos. These comments were not completely

3066_cre-ip_complaint.pdf (indicating the underlying reasons behind the enforcement).

208 Id. ¶ 7.
209 Id. ¶¶ 8–9.
210 Id. ¶¶ 25–33.
211 Id.
212 See, e.g., id. ¶¶ 15–19.
214 Patterson made this comment despite previously admitting over social media that she personally would not be participating in the Olympics. See Exhibit B at 1, Creaxion Corp., FTC File No. 172 3066 (Nov. 13, 2018), available at
false (protection generally from mosquitoes would protect from Zika virus-carrying mosquitoes), but they certainly stretched the truth and potentially put the lives of others at risk. The same was true of the other influencer, Jake Dalton. His social media posts included statements that he was not afraid of Zika because the mosquito repellent “ha[d] [his] back and body covered.” While the FTC complaint only included advertisements that were prefabricated and standardized, the exhibits indicated that both influencers were involved in the writing and posting of deceptive, false, and potentially life-threatening information during the Zika pandemic. Despite having willingly propagated possibly the most dangerous deception of any of the influencer cases discussed, the FTC still did not enforce against them.

H. Teami, the Current Standard: Enforce Against Companies, Educate Influencers

In FTC v. Teami, the FTC brought an enforcement action under Section 5(a) and Section 12 of the FTC Act against an online tea seller. Teami sold multiple blends of teas and tea products through its online store. On its website, Teami advertised that its tea blends had specific health benefits, such as colon detoxification and weight loss. Teami advertised its products through its own social media posts, as well as via the posts of paid influencers, a number of whom are pop-culture celebrities. In its complaint, the


216 See Exhibit C, supra note 213, at 1.

217 See generally id.; supra note 214.


219 Id. ¶ 11.

220 Id. ¶ 14.

221 These included Demi Lovato, Cardi B, and Adrienne Eliza Houghton, among others. Id. ¶¶ 11, 20.

222 Id. ¶¶ 20–21. These totaled tens-of-millions of views. For example, Cardi B’s post alone garnered 20.4 million views. Id. ¶ 20.
FTC alleged Teami had misrepresented the effects of using their products and had failed to disclose material connections in advertising. The FTC also stated that it had previously reached out to the defendants to inform them of their need to create a disclosure policy for its influencers. The FTC then noted that Teami agreed to implement policies which would require disclosure and post content monitoring by Teami, but Teami failed to enforce these policies. In response to these violations, the FTC and Teami stipulated to a monetary judgment of $15,209,452, with $14,209,452 suspended upon the payment of $1 million. The FTC also ordered an injunction against Teami’s assertion of false claims related to the health effects of its tea products and mandated disclosure of material connections in its advertising. Finally, the FTC sent out “Warning Letters to Instagram Influencers to Prominently Disclose Paid Endorsements” to the influencers involved.

A closer look at the decision reveals that the thrust of the press release and the enforcement concerned just how deceptive the influencer advertising of Teami’s products was. In its enforcement, the FTC included a forty-nine page, twenty-six exhibit list indicating just how deeply involved Teami’s influencers were in propagating its deception. The FTC found that Teami relied on influencers in

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223 Id. ¶ 25–30.
224 Id. ¶¶ 16–19.
225 Id.
227 Id. at 5–6.
228 Id. at 11–12.
230 Exhibits 9–13, FTC v. Teami, LLC, FTC File No. 182 3174, No. 8:20-CV-518 (M.D. Fla. Mar. 5, 2020), available at https://www.ftc.gov/system/files/documents/cases/1823174teami complaint exhibits1-26.pdf (including statements like “[t]his detox is my all time FAVE [sic] . . . especially because I see a difference within like 3 days . . . I’ve been drinking it now for a week and I’ve already lost about 3 pounds . . . insane.” (emphasis added)).
a variety of fields—from singers to fashion models, pop culture icons, and fitness icons. The FTC also acknowledged that Teami had guidelines for influencer posting requirements, even if Teami’s own enforcement of those guidelines was insufficient.

The influencers involved were not micro-influencers. Instead, a number of the influencers on Teami’s payroll were household pop-culture names who are themselves sophisticated, or have access to sophisticated business teams. Yet the FTC chose not to enforce against these parties, and instead sent out what it called “Warning Letters to Instagram Influencers to Prominently Disclose Paid Endorsements.” In the warning letters, the FTC gave the influencers legal advice regarding how they could comply with FTC regulation in the future. The letters also “strongly recommend[ed]” that the influencers review its Disclosures 101 guide. The strongest enforcement within the letter was that the FTC required a written response requesting that influencers describe how they will alter their social media activities to comply with its rules.

In spilling Teami’s tea, the FTC’s enforcement can best be described as curiously asymmetric. While the FTC was at pains to

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231 Complaint, supra note 218, at 14 (listing Cardi B, Brittany Renner, and Leyla Milani-Khoshbin, among others).
232 See id.
233 See id. ¶¶ 16–18.
234 Id.
236 See generally FED. TRADE COMM’N, supra note 229.
237 See, e.g., id. at 2.
238 Id.
239 Id.
point out the strength of its enforcement, it also provided arguably better reasoning for enforcement against the influencers involved. While the FTC was clear that the use of influencers was key to Teami’s social media deception and Section 5 violation, its non-enforcement against sophisticated influencers who broke with Teami’s internal social media policy was starkly in contrast to its enforcement against Teami. The FTC fined Teami $15.2 million (suspended after the payment of 1 million), and the influencers received a letter requiring them to do the bare minimum. This asymmetry aptly describes the current standard: aggressively enforce against businesses, but slap influencers on the wrist.

I. Outside the Enforcement Regime 2017–2020

While the disclosure standard has long been applied to endorsements in advertising content, it has not been widely applied to influencers in enforcement actions involving social media influencer-produced content. Instead, akin to the Teami paradigm, the FTC’s efforts at stemming influencer non-compliance have been focused on education.

In April 2017 the FTC sent ninety “educational letters” to marketers and influencers to remind them that they must disclose material connections. Then, in September 2017, twenty-one influencers received follow-up warning letters regarding potential failures to disclose material connections. That month, the FTC brought its first enforcement action against social media influencers that failed to disclose their joint ownership of companies whose

240 See Fed. Trade Comm’n, supra note 36 (discussing the variety of sanctions imposed by the FTC and the severity of the sanctions).

241 See id. (showing the deception perpetrated by influencers contracted by Teami).

242 Id.

243 Id.

244 See, e.g., Fed. Trade Comm’n, supra note 21.


products they advertised.\textsuperscript{247} The FTC also updated its FAQs in September 2017,\textsuperscript{248} telling influencers: (1) Use clear and unambiguous disclosure language; (2) do not bury disclosures; (3) comply with the Enforcement Guides when tagging a brand; (4) consider all potential material connections; (5) disclose any connection that would be relevant to how the consumer views the endorsement; and (6) disclose within images on image-only platforms.\textsuperscript{249}

This was followed in November of 2019 by the FTC’s “Disclosures 101 for Social Media Influencers,”\textsuperscript{250} an eight-page brochure that took the form of a soft approach to education, as opposed to the imposing letter format.\textsuperscript{251} However, the brochure also indicated that influencers bore the affirmative requirement of disclosure of material connections, familiarity with the Endorsement Guides, and compliance with the law.\textsuperscript{252} Though this did not break with endorsement disclosure regulations generally,\textsuperscript{253} the brochure’s

\textsuperscript{247} Id.; see also supra Part III.E (discussing the enforcement action in CSGOLotto).
\textsuperscript{248} See Fair, supra note 246.
\textsuperscript{250} FED. TRADE COMM’N, supra note 21. It should be noted that this is not the only educational effort the FTC has made. The FTC has engaged in a wide variety of educational activities regarding deception. See, e.g., Advertisement Endorsements, FED. TRADE COMM’N, https://www.ftc.gov/news-events/mediaresources/truth-advertising/advertisement-endorsements (last visited Apr. 12, 2021) (providing resources for related public events held by the FTC, as well as public statements and reports).
\textsuperscript{251} See FED. TRADE COMM’N, supra note 249.
\textsuperscript{252} FED. TRADE COMM’N, supra note 21, at 2 (“As an influencer, it’s your responsibility to make these disclosures, to be familiar with the Endorsement Guides, and to comply with laws against deceptive ads. Don’t rely on others to do it for you.”).
\textsuperscript{253} For example, the FTC’s guide, What People Are Asking, published in September of 2017, stated that influencers are required to self-regulate by disclosing. See FED. TRADE COMM’N, supra note 249. (“Yes, an endorsement can be aspirational. It’s an endorsement if the blogger is explicitly or implicitly expressing his or her views about the sports car (e.g., “I want this car”). If the blogger was paid, it should be disclosed.”). The FTC’s 2009 publication of the Endorsement Guides represented the first time that the FTC explicitly required
requirements placed the onus on influencers where every influencer enforcement but CSGOLotto had not.

While likely well intentioned, FTC’s gentler, educational method accomplished little. Empirical data indicates that the vast majority of influencers continued (and still continue) to violate disclosure requirements. In response to the recent, but unrelenting, issue of influencer non-compliance, at least one FTC Commissioner argued in favor of essentially returning to the Machinima method—just enforce against businesses. Having failed to accomplish its goals through enforcement (almost entirely against businesses), the FTC also failed to accomplish those same goals by educating influencers.

IV. PUBLIC COMMENTS AND THE 2020 NOPR

The FTC, as evidenced by the line of enforcements just discussed, has not responded to the growing use of influencers in advertising, endorsements, and product promotions. Despite a clear, acknowledged authority to apply the deception standard, the FTC

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Robin Langford, Three Quarters of Instagram Influencers Hide Their Advertisement Disclosure in Their Posts, NETIMPERATIVE (Sept. 22, 2020), http://www.netimperative.com/2020/09/22/three-quarters-of-instagram-influencers-hide-their-advertisement-disclosure-in-their-posts-2/ (“More than three quarters of influencer adverts on Instagram have the disclosure hidden somewhere in the post, whether that be in the middle, at the end or in a comment, according to new research.”).

Id.

Statement of Commissioner Rohit Chopra Regarding the Endorsement Guides Review Commission File No. P204500, FED. TRADE COMM’N (Feb. 12, 2020), https://www.ftc.gov/system/files/documents/public_statements/1566445/p204500_endorsement_guides_reg_review_chopra_stmt.pdf (“When individual influencers are able to post about their interests to earn extra money on the side, this is not a cause for major concern. But when companies launder advertising by paying someone for a seemingly authentic endorsement or review, this is illegal payola.”).
has not brought meaningful enforcement actions against influencers. Worse, the FTC has yet to find an influencer liable solely for their role in deceiving the public as an advertising mechanism for another organization. All of this despite the empirical backdrop of 86% influencer non-compliance.\textsuperscript{257} Instead of taking action against influencers, in February of 2020 the FTC once again balked on using its enforcement authority, choosing instead to include questions on the issue of social media influencers in its regularly scheduled ten-year review of the agency’s endorsement guidelines.\textsuperscript{258}

During this review, the FTC solicited public comment on “the economic impact of and the continuing need for its Endorsement Guides; possible conflict between the Guides and state, local, federal, or international laws; and the effect of any technological, economic, environmental, or other industry changes on the Guides.”\textsuperscript{259} Three of the twenty-two areas the agency solicited comment on involved endorsements and social media.\textsuperscript{260}

For example, Premise 14 asked:

How well are advertisers and endorsers disclosing unexpected material connections on social media platforms? Does this depend on the type of material connection? What disclosures of material connections are sufficiently clear (\textit{i.e.}, understandable) to consumers when used in social media? What disclosures of material connection currently being used in social media are likely not understood by consumers? Does the sufficiency or insufficiency vary by platform, type of material connection (\textit{e.g.}, a paid post versus a free product), or other factors, and, if so, how? To the extent that these connections are not being adequately disclosed, do the problems tend to be in the substance of the disclosures or in their

\textsuperscript{257} See infra note 293; see also INFLUENCER MKTG. HUB, supra note 19.
\textsuperscript{258} Guides Concerning the Use of Endorsements and Testimonials in Advertising, 85 Fed. Reg. 10104 (Feb. 21, 2020).
\textsuperscript{259} Id.
\textsuperscript{260} Id.
conspicuousness (e.g., placement, visibility, or audibility)? Should the Guides provide more detail on what disclosures of material connections are sufficiently clear or unclear in different social media formats? Does the fact that Commission Guides are generally reviewed every ten years affect your answer as to whether providing more detail would be helpful? 261

Likewise Premise 19 sought comment on citizen knowledge of influencer advertising:

Some advertisers contend that consumers who use social media understand that influencers who promote products are generally doing so only because they are paid or given something by the marketer, regardless of what or whether disclosures appear in social media posts. What evidence is there to support or contradict this assertion and does the answer differ depending on the nature of the material connection? In particular cases, what factors might be considered to determine whether a material connection is unexpected? Do consumer expectations vary by the age of the audience, the product category, the nature of the influencer, the format or substance of the endorsement, or otherwise, and if so, how? 262

And Premise 20 asked for comment on the relationship between influencers and affiliate links:

Some endorsers (including the authors of some product reviews) include affiliate links that can be used to purchase the products they are endorsing. Should the Guides address such links, and if so, how? To what extent do consumers expect that these endorsers are compensated for purchases through those links? If so, what compensation arrangements do consumers ordinarily expect? To what extent would knowing of such compensation affect the

261 Id.
262 Id.
weight or credibility given to those endorsements? Is there a distinction in terms of either consumer expectations or the weight ascribed to an endorsement between affiliate links to a product’s marketer and affiliate links to one or more retailers? If so, how, why, and how should that be addressed?

The initial inquiry was set to run from February 21 to April 21, 2020, but the agency extended the deadline for responses until June 21, 2020. During the four months, the FTC received 118 comments through a comment portal on Regulations.gov. At the close of the comment period, all 118 comments were obtained from the website for analysis. Each comment was read and categorized for five specific attributes:

1. Did the comment mention social media influencers or refer to questions 14, 19 or 20?
2. Does the text of the comment advocate for stronger enforcement of the agency’s endorsement guidelines?
3. Did the comment contain evidence (empirical or otherwise) or was it a simple opinion?
4. Did the commenter indicate a belief that social media influencers or social media influencer-produced content could be deceptive under the current standard?
5. Was the commenter associated with the advertising industry?

Quantitatively, of the 118 comments received, only nine of the comments did not address influencers directly or respond to

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263 Id.
264 Id.
265 See Guides Concerning the Use of Endorsements and Testimonials in Advertising, 85 Fed. Reg. 19,709 (Apr. 8, 2020) (“The Commission believes that a two-month extension is appropriate. Accordingly, it has decided to extend the deadline for submission of comments on the Endorsement Guides to Monday, June 22, 2020.”).
questions 14, 19 or 20 posed by the agency. Twenty comments came from advertising industry or trade groups. Sixteen of the comments were opposed to any additional regulation of social media influencers, and nineteen of them argued that social media influencers were not engaged in deceptive practices currently.

In response to the FTC’s larger inquiry, a combined total of twenty-eight of the 118 comments did not advocate for stronger enforcement mechanisms and thirty-two did not indicate a belief or provide evidence that influencer conduct was deceptive in some way. Eighty-one of the 118 comments advocated, in at least some language, for stronger enforcement by the agency, and two comments in this category also argued for promulgation of rules that would provide a parity with the regulation of social media influencer content in Europe. Coders also took qualitative notes about the themes of the comments. Comment length ranged from a single sentence advocating for disclosure guidelines similar to the FTC’s regulation of online native advertising, to detailed filings with examples of influencers who are violating the current guidelines under the November 2019 Disclosures 101, from pro-consumer advocacy groups like Truth in Advertising. An additional detailed comment

267 Id.
268 Id.
269 Id.
271 One such comment argued that “[i]nfluencer marketing is not a national issue: as an illustration, influencers from the United States have a European fanbase, and vice versa [sic]. For this reason, regulatory developments should ideally be coordinated, or at least need to circulate beyond the jurisdiction where they originate. Similarly, the study of influencer marketing ought to take into account the post-jurisdictional nature of social media.” Maastricht Univ., Comment on Guides Concerning the Use of Endorsements and Testimonials in Advertising (Apr. 22, 2020), https://www.regulations.gov/comment/FTC-2020-0017-0082.
opposed to additional regulations came from a self-described social media influencer advocacy organization, called the American Influencer Council.273

A pair of the comments were focused primarily on the issue of deception by social media influencers who produce content targeted at children.274 A significant series of the comments in the inquiry docket were filed by what appeared to be university students, with one entry’s attachment titled “Extra Credit” that included a student’s name and course number in the upper left of the document.275 Two comments conflated the FTC’s endorsement guidelines with the similar and longstanding sponsorship identification rules enforced on broadcast radio and television stations by the FCC.276

Multiple commenters proposed that the agency’s ten-year cycle for reviewing its endorsement guidelines was too long.277 In one

273 See Am. Influencer Council, Inc., supra note 270.
277 E.g., Jane Weesner, Comment on Guides Concerning the Use of Endorsements and Testimonials in Advertising (Mar. 21, 2020), https://www.regulations.gov/comment/FTC-2020-0017-0010 (“[I]t is not realistic that a review every ten years can capture the new ways in which our world communicates.... [T]he FTC should review their guides at least every five years.”); Jake Zeidman, Comment on Guides Concerning the Use of Endorsements and Testimonials in Advertising (Mar. 29, 2020), https://www.regulations.gov/comment/FTC-2020-0017-0044 (“Social media is constantly emerging, and the guidelines need to be reviewed more often than every 10 years.”); Sofia W., Comment on Guides Concerning the Use of Endorsements and Testimonials in Advertising (Mar. 10, 2020) https://www.regulations.gov/comment/FTC-2020-0017-0007 (“I believe it would be of the best interest for the FTC to review their guidelines every 3–4 years, rather than every 10 years.”).
example, the commenter suggested an annual review process, while others argued for three and five-year cycles.\footnote{NetChoice, Comment on Guides Concerning the Use of Endorsements and Testimonials in Advertising (June 21, 2020), https://www.regulations.gov /comment/FTC-2020-0017-0090; see also Am. Influencer Council, Inc., \textit{ supra} note 270.} Another theme which appeared in multiple comments, including one focused on the activities of “e-sports” influencers, proposed that the FTC needed to be more specific about when disclosures are required for influencers as well as additional specificity about the language the agency would like to see in posts.\footnote{Esports Bar Ass’n, Comment on Guides Concerning the Use of Endorsements and Testimonials in Advertising (June 21, 2020), https://www.regulations.gov/comment/FTC-2020-0017-0113.} Likewise, the majority of the comments filed by advertising industry representatives advocated for more clarity regarding when the existing rules apply to content, but argued against additional regulations, especially as they related to the content produced by social media influencers.\footnote{Nat’l Retail Fed., \textit{ supra} note 276; see also Performance Mktg. Ass’n, Comment on Guides Concerning the Use of Endorsements and Testimonials in Advertising (June 21, 2020), https://www.regulations.gov/comment/FTC-2020-0017-0089 (entitling the first heading: “Greater Clarity on What Constitutes Disclosure is Needed”); Performance-Driven Mktg. Inst., Comment on Guides Concerning the Use of Endorsements and Testimonials in Advertising (June 22, 2020), https://www.regulations.gov/comment/FTC-2020-0017-0094 (“PDMI’s major concern is that the Commission avoid ‘one size fits all’ rules of disclosure which would chill the effective communication of advertising messages while not adding in an appreciable way to the useful information made available to consumers.”); Ass’n of Nat’l Advertisers, Comment on Guides Concerning the Use of Endorsements and Testimonials in Advertising (June 22, 2020), https://www.regulations.gov/comment/FTC-2020-0017-0091 (“While instructive in many ways, the current Guides do not adequately address current social media realities and related consumer behavior. Instead, they provide several outdated examples that are difficult for many to apply, particularly in the current media landscape.”).} One comment proposed some revisions to the existing guidelines, rather than expanding them, but argued that a more expansive scheme of industry self-regulation was preferable to FTC action.\footnote{Kshirsagar, \textit{ supra} note 276.}
V. DISCUSSIONS OF CHANGING FTC ENFORCEMENT POLICY

The FTC’s apparent desire to keep kicking the social media influencer can down the road is unsustainable if the agency intends to continue to serve as a consumer protection entity. Non-disclosure of material connections by influencers concerning payment by businesses to advertise products has become a systemic problem. The violations have become so normalized that an otherwise regulation-averse advertising industry now admits that something must be done to outline what kind of advertising is permissible. Despite the fact that the FTC has brought powerful online entities like Google, Snapchat and Facebook to heel using deception enforcement, it has been reluctant to apply its enforcement authority to the users of those platforms engaged in what even the agency itself has acknowledged are deceptive practices.

We believe the regulatory answer to the issue of influencer deception is quite simple. The FTC just needs to use its enforcement authority against influencers who engage in deceptive practices. We believe a minimum of six to eight enforcement actions across the realm of the influencer economy is past due. Influencers at various follower levels ranging from nano to mega should be enforced against. But it is also critical that the advertisers, affiliate groups, and brands that utilize influencers, but fail to proactively require

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282 See supra Part III.
283 See supra Part IV.
284 See generally supra Part III. Interestingly, when compared to the FCC’s enforcement, the FTC’s non-enforcement is particularly odd. Comparatively, even the normally content enforcement-reluctant Federal Communications Commission maintains a low tolerance for complaints dealing with non-disclosure for sponsored broadcast elements. See 47 C.F.R. § 73.1212 (2020) (requiring disclosure for video news releases). Aside from the $13 million fine assessed to Sinclair for failure to comply with the rules under § 73.1212 while running video news releases, the FCC has assessed fines for non-disclosure in cases involving brokered political news content and even for actively failing to include the name of a business in a regularly scheduled advertisement. See Sinclair Broad. Grp., Inc., 32 FCC Red. 10853, 10853 (2017) (fining Sinclair Broadcast Group $13,376,200). While broadcasters languish under rules that are still stringently enforced, social media influencers have been given a universal hall pass by the FTC to continue to engage in deceptive practices.
disclosure compliance among their paid endorsers, be enforced against as well.

This rights three specific issues with the discussed line of enforcements. First, in finally enforcing against an influencer as part and parcel of a deceptive scheme, the FTC would reverse the harmful precedent of the previous enforcements.\textsuperscript{285} For example, in enforcing against an influencer, the FTC would reverse its precedent in Creaxon and Telomerase and finally acknowledge that influencers have sufficient agency to comply or not comply with federal deception laws.\textsuperscript{286} Bringing an enforcement would also recognize that influencers are engaged in business practices as influencers, which CSGOLotto got right, but Warner Bros. Home Entertainment, Machinima, and Lord & Taylor did not.\textsuperscript{287} Doing so would also set clear precedent for future enforcement, the metaphorical stick that has been largely missing from deception enforcement of influencers. Most importantly, this will reestablish the FTC’s enforcement credibility on consumer protection against deceptive claims and undisclosed material connections, things that all evidence demonstrates social media influencers are delivering in large quantities.\textsuperscript{288}

Second, the FTC needs to set some guideposts by engaging in some enforcement actions against social media influencers who are serial violators of deception rules. The guideposts do not have to be uniform for every kind of influencer. Engaging in several

\textsuperscript{285} See supra Part III.

\textsuperscript{286} For example, some marketers have argued that influencer marketing differs from traditional marketing strategy in part because influencers need to be given room to run to create the kind of content that feels authentic. \textit{100 Influencer Marketing Statistics for 2021}, INFLUENCER MKTG. HUB (Feb. 24, 2021), https://influencermarketinghub.com/influencer-marketing-statistics/. This view requires the implicit assumption that influencers are capable of producing quality work that fits within a specific request’s purview, without going too far afield from what their authentic content should be like for consumers. \textit{Id.} (“For influencer marketing to sustain, authenticity and credibility is key.”). By this view marketers should not smother influencers by asserting full control because that would stymie the effectiveness of utilizing influencers in the first place. \textit{Id.} (“[T]oday’s consumer can tell the difference between an advert, a personal recommendation, and an advert masked under a personal recommendation.”).

\textsuperscript{287} See supra Part III.

\textsuperscript{288} See Chan, supra note 64, at 332–33.
enforcements would allow the FTC to tailor specific protocol requirements to specific kinds of influencers. For example, gaming influencers, like those in Warner Bros. and Machinima, are often engaged in different forms of influencer campaigns, may be most active on gaming-centric social media platforms, and may violate disclosure requirements in different ways from fashion influencers.\footnote{Compare Marianna Hewitt, \textit{Ask a Blogger: Exactly How Do Fashion Bloggers Make Money?}, HARPER’S BAZAAR (Aug. 18, 2015), https://www.harpersbazaar.com/culture/features/a11902/how-do-fashion-bloggers-make-money/ (listing different methods of becoming a professional fashion blogger), and Sabrina Fenster, \textit{How to Choose A Fashion Affiliate Network}, SHELF (Aug. 25, 2019), https://www.theself.com/influencer-resources/how-to-choose-a-fashion-affiliate-network (discussing affiliate link programs in greater detail), with \textit{The Ultimate Guide to Becoming a Gaming Influencer on Livestream Platforms}, INFUENCER MKTG. HUB, https://influencermarketinghub.com/how-to-be-gaming-influencer/ (last updated May 14, 2020) (indicating that video game influencers rely less upon affiliate link programs and rely more upon cultivation of a brand and subsequent platform payment tools).} This is simply one example, but by creating guideposts for different kinds of influencers, the FTC can effectively create expectations of what is required for both influencers and the businesses which contract with them. This will balance the use of influencers in social media with endorsements or endorsers that appear in advertising in other mediums.

Third, it will put advertisers and influencers on notice that non-compliance with the agency’s disclosure requirements could result in some expensive consequences. Several enforcements could create reasonable expectations of sanction for size and kind of influencer. Multiple and varied types of enforcement actions would give the FTC the opportunity to set precedent that acknowledges that each level of influencer possesses a different level of sophistication, and therefore different degrees of responsibility.\footnote{Max Willens, ‘\textit{A More Sophisticated Influencer Strategy’: Publishers are Building Teams to Recruit ‘Expert Networks’}, DIGIDAY (Apr. 12, 2019), https://digiday.com/media/sophisticated-influencer-strategy-business-news-publishers-accumulate-influential-audiences/ (indicating the increasing sophistication of influencer strategies).} For example, the FTC could utilize financial sanctions that scale with the quantity of followers, reserving the high-profile headlines proclaiming large
fines for cases against well-known celebrities or other wealthy influencers.291

This is mutually beneficial overall. Following these sanctions, the advertising industry will proclaim its ability to self-regulate, and adjudicative action is certain to generate some attention as well as expand compliance with the rules. An action taken against a high-profile influencer or public figure will also generate headlines outside of the advertising world, spreading the message even further.

While we recognize the FTC cannot fully police the entire realm of social media, there are plenty of candidates among the 86% of non-complying influencers for the FTC to choose from.292 While some of the commenters called out for drastic action in the FTC’s 2020 endorsement guideline inquiry, in practical terms what we are arguing is that what the agency needs to do is “set some precedent.”293 The agency has already made the determination

291 Still, even scaled enforcements would recognize that influencers are often highly sophisticated parties that should be expected to comply with the law. For example, before the FTC enforced against Machinima, Machinima was a behemoth of a channel and boasted over 12 million subscribers. Bill Flook, Veenome’s Kevin Lenane on Twitch, Amazon and the Validation of User-Generated Content, WASH. BUS. J. (Apr. 28, 2014), https://www.bizjournals.com/washington/blog/techflash/2014/08/veenomes-kevin-lenane-on-twitch-amazon-and-the.html; Julia Alexander, Machinima, One of YouTube’s Biggest and Oldest Channels, Goes Dark, VERGE (Jan. 19, 2019), https://www.theverge.com/2019/1/19/18189611/machinima-youtube-fullscreen-warner-bros-multi-channel-network.

292 See INFLUENCER MKTG. HUB, supra note 19 (“We found only 14% of posts to be fully compliant and meeting all regulatory guidelines as set out by the FTC and CMA.”). Importantly, even the Influencer Marketing Hub report recognized the possibility of FTC enforcement due to the high number of non-complying influencer posts. See id. (“[T]here is a real danger that the FTC and CMA will start prosecuting rather than just warning and educating.”). Unsurprisingly, and likely in part because of the FTC’s failure to enforce its § 5(a) authority, this compliance rate is only marginally higher than the previous year’s 11% compliance rate. Id.

293 While the authors are staunch First Amendment advocates who are generally reluctant to make calls for subsequent punishment in the form of state action, it bears mention that deceptive commercial speech is not granted the same deference as other forms of speech under the First Amendment. See Va. Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 771–73 (1976).
through its letters that nondisclosure in influencer speech is
deceptive. If the FTC wants to move past those determinations, the
opportunity to use some of the many examples of failed disclosures
provided by the commentators within the Endorsement Guides
review remains available.294

We also do not make this proposal absent a consideration of the
commenters who were opposed to additional regulation, many of
whom stated in their comments that they were seeking some
additional guidance on the rules.295 Adjudications will achieve this
result faster and certainly more effectively than an extended
rulemaking proceeding, to say nothing of the months that have
passed without formal agency action since the inquiry was closed.296

Nor do we propose enforcement against influencers as the sole
option.297 The FTC’s educational outreach to influencers should
continue, and the FTC should continue to pursue opportunities to
create compliance incentives outside of enforcement.298 However,

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294 See generally Guides Concerning the Use of Endorsements and
(offering numerous examples of failed disclosures and methods to curb these
abuses).

295 See, e.g., Maastrict Univ., supra note 271 (listing many likely issues that
discourage the FTC’s coaxing influencers to comply with the guides).

296 Guides Concerning the Use of Endorsements and Testimonials in
Advertising, 85 Fed. Reg. at 10104 (indicating the date of the rule and the length
of time passed since comments have been received).

297 Indeed, even comments on the FTC’s website indicate that the FTC is a
“great resource” for compliance information. See Lesley Fair, Endorsement
Guides: The FTC Wants Your Feedback, FED. TRADE COMM’N (Feb. 12, 2020),
https://www.ftc.gov/news-events/blogs/business-blog/2020/02/endorsement-
guides-ftc-wants-your-feedback. These authors do not think the FTC should un-
publish its guides, the Disclosure 101 documentation, or cease its social media
outreach events; they propose instead that these should bolster enforcement action
for violations by influencers.

298 Platforms defunding advertisements for non-compliant influencers has
become one trendy solution, but it is unlikely to succeed without sufficient
enforcement against select, non-compliant influencers by the FTC. See Andrew
Hutchinson, Instagram Announces New Crackdown on Influencers Who Fail to
Disclose Commercial Partnerships, SOCIALMEDIATODAY (Oct. 16, 2020),
https://www.socialmediatoday.com/news/instagram-announces-new-crackdown-
on-influencers-who-fail-to-disclose-commercial-partnerships (discussing Instagram’s
history of attempts to curb influencer non-disclosure).
sufficiently strong enforcement against influencers must be part of the solution, regardless of the other prongs the FTC chooses to undertake.

CONCLUSION

Historically, the FTC has used enforcement actions as a model for other advertisers to follow, and to outline actions to avoid in future advertising. The FTC’s lack of enforcement against influencers has led to a status quo of non-compliance. After two attempts at self-regulation, another set of advisory guidelines or another informational video where an FTC staff attorney uses jump cuts and outfit changes in a failed attempt to appear hip is not going to generate compliance. Not ironically, the FTC’s passive approach to influencers has turned it into the follower without influence.

Deceptive practices by social media influencers have become normatively accepted while the FTC has dawdled on exercising the same authority that it has widely used against endorsements in advertising appearing in traditional media for decades. The FTC, if it wishes to take the agency’s consumer protection mission seriously, must step up and enforce deception in online advertising, including that of influencers. As 2020 has come and gone, the FTC has refused to take the issue on directly, offering guidelines rather than engaging in adjudicative enforcement actions against serial violators. If the FTC does not act, brands, advertising firms, and influencers will continue to flaunt the law.

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299 See generally Karns, supra note 71, at 429–30 (detailing FTC’s use of advertising enforcement actions and adjudication from the 1930s to the 1980s to assert its advertising deception policy stances).

300 For example, the FTC has created blog posts that purport to solve this issue, but a glance at the comments section indicates that nearly all commenters disagree. Fair, supra note 246.